DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

OCT 28 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	GC Docket No. 92-52
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741
	)	

TO: The Commission

Reply Comments of the National Association of Broadcasters on the Further Notice of Proposed Rulemaking

The National Association of Broadcasters ("NAB")[1] submits this reply to the comments filed on the *Further Notice of Proposed Rulemaking* in the above-referenced proceeding. The majority of the comments received by the Commission focused primarily on the question of whether a mandatory holding period should be imposed on licensees of new facilities, and in particular, these comments opposed any retroactive application of a longer holding requirement on stations now in service.[2] NAB opposed any new manda-

1 NAB is a nonprofit, incorporated association of radio and television stations and networks which serves and represents the American broadcast industry.

2 *See, e.g.,* Comments of Rex Broadcasting Corp., GC Dkt. No. 92-52 (filed Oct. 13, 1993); Comments of Reed Smith Shaw & McClay, GC Dkt. No. 92-52 (filed Oct. 13, 1993); Comments of Marc C. Scott Communications, Inc., GC Dkt. No. 92-52 (filed Oct. 13, 1993).

tory holding rule and, therefore, supports the views expressed in those comments.[3] NAB will respond to the one set of comments strongly urging the Commission to create broad new anti-"trafficking" rules applicable to all licensees, filed by Black Citizens for a Fair Media, *et al.*[4]

The *BCFM Comments* rest on two assumptions: (1) "trafficking" in broadcast licenses is always inimical to the public interest, and (2) "trafficking" has been widespread since the Commission abolished its previous three-year holding rule in 1982. Unfortunately, there is nothing in the *BCFM Comments* to support either of these propositions, apart from BCFM's own assurances to the Commission that things are as BCFM sees them. The creation of a new regulatory regime, imposing costs on large numbers of licensees, however, requires more. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1458 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986)("[T]he Commission must do more than ask us to defer to its 'more or less intuitive model' and 'collective instinct' to sustain its assertion that a rule is both necessary and important").

Surely, no one would argue that a licensee is acting in the public interest if it acquires a station for the sole purpose of making a short-term profit, and who to that end simply dispenses with programming designed to serve public needs and interests. "Trafficking," as so defined, would indeed be the proper subject of Commission action. The problem with BCFM's arguments, however, is that there is not one shred of evidence that such "trafficking" in licenses has occurred, or has been facilitated by the 1982 change in the Commission's rules.

---

3 In particular, NAB commends to the Commission's attention the carefully reasoned objections to both new mandatory holding requirements and retroactively applied holding rules in the comments of Reed Smith Shaw & McClay.

4 Comments of Black Citizens for a Fair Media, *et al.*, GC Dkt. No. 92-52 (filed Oct. 13, 1993)[hereinafter *BCFM Comments*]. Similar views were also expressed in the comments filed by the United States Catholic Conference, and NAB's reply comments should be deemed to apply to those arguments as well.

It cannot be that the mere transfer of a license within three years of the most recent previous transfer of that license is itself any indication of trafficking. Indeed, during the 20 years in which the Commission had a rule similar to the one BCFM wishes it to adopt now, the Commission reviewed hundreds of applications to transfer licenses held for less than three years. Not only did it permit every one of those requested transfers, it never found even enough evidence of improper "trafficking" to warrant designating an issue for hearing, as its rule required. Moreover, as NAB pointed out in our comments on the *Further Notice*, license transfers may occur in situations, such as mergers, where no meaningful change in operating control has occurred.[5] There can be no suggestion, therefore, that the mere number of license transfers occurring within any time period after a previous transfer is any evidence of a pattern of improper trafficking.[6] If the problems of "trafficking" were as widespread and obvious as BCFM appears to believe, surely the Commission would have at least found one questionable transfer to investigate. The fact that it did not do so is conclusive proof that no problem exists with rapid, speculative turnover of broadcast licenses.

BCFM, however, asserts that the repeal of the Commission's anti-trafficking rule was the cause of instability in the broadcast marketplace, which it claims is contrary to the public interest. BCFM's arguments in this regard suffer from the logical fallacy of *post hoc ergo procter hoc*.[7] The mere fact that the number of transfers of broadcast stations, and the average price paid for those stations, increased after the Commission no longer required applicants to seek a waiver before transferring a license held for less than three

---

5 Comments of the National Association of Broadcasters on the Further Notice of Proposed Rulemaking, GC Dkt. No. 92-52 (filed Oct. 13, 1993) at 10-11.

6 The one case in which the Commission has found that a licensee engaged in trafficking, *Crowder v. FCC*, 399 F.2d 569 (D.C. Cir. 1968), did not even involve a transfer application.

7 After that, therefore, because of that.

years, does not by itself prove that the repeal of the rule was the cause of these marketplace changes. During the same period, the Commission substantially deregulated radio and television programming, removed impediments to hostile takeovers of companies holding broadcast licenses, licensed hundreds of new stations, and, perhaps most significantly, increased the number of stations which could be controlled by a single entity. Apart from Commission actions, the period after 1982 included substantial changes in the tax laws, the mushrooming growth of cable television as a competitor to broadcasting, and increased availability of bank financing for the acquisition of broadcast stations. Any one of these factors, as well as others, may have had a far more substantial impact on the market for broadcast stations than did the Commission's repeal of its never-applied anti-trafficking rule. BCFM's "evidence" of market instability thus cannot support any conclusion about the existence of improper trafficking or the impact of the change in the Commission's rules.

Further, the station sales data which BCFM supplies does little more than demonstrate that the number of station sales increased during part of the 1980's. Were station trafficking an increasingly dominant mode of station ownership, as BCFM seems to suggest, the number of station sales should have steadily increased after 1982, to the point where virtually all of the nation's more than 10,000 broadcast stations would be "in play." The facts, however, are otherwise. Station sales increased in some years, and decreased in others. This evidence is more consistent with the view that there was a pattern of ownership changes when investment and tax policies encouraged greater station ownership, and those owners have since continued to invest in and operate those stations. If, as BCFM asserts (*BCFM Comments* at 11), station sales are again on the increase, that may also be the result of the Commission's recent changes in its radio multiple ownership rules to encourage more efficient radio operations. The license transfers which are needed to form these more efficient radio groups certainly could not be regarded as contrary to the public interest.

The price instability BCFM claims was caused by the repeal of the three-year rule is also not demonstrated by BCFM's simplistic reliance on the average price paid each year for radio and television stations. Where the average price paid for a television station was more than 33 million dollars in 1985, and only three million dollars in 1992, BCFM cannot be seriously suggesting that the stations involved in these two sets of transactions were comparable. A station worth over thirty million dollars in 1985 was not worth only a tenth of that amount seven years later. Instead, the fluctuation in the average price is clearly the result of a different set of stations being transferred during each year.[8] BCFM's data, therefore, does not establish that there is an unstable market for broadcast stations.

Even assuming *arguendo* that the station market has become unstable, BCFM does not identify how the public interest has been affected by that change, or why stability in the prices paid for broadcast stations should be an objective of the Commission. The Communications Act "recognizes that the field of broadcasting is one of free competition." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). The system of broadcasting established by Congress necessarily involves allowing investors in broadcast stations to succeed or fail in the market depending on the value the public perceives in their program offerings. If they succeed, not only will their current revenues be enhanced, the value of their investment in a station will also go up. Artificially constricting the market for broadcast stations would thus fly in the face of the Congressional design for the broadcasting industry.

Indeed, BCFM demonstrates its lack of understanding of this principle by its reliance (*BCFM Comments* at 11-12) on the Commission's renewal expectancy policy as a reason for requiring a minimum holding period. *See, e.g., Central Florida Enterprises, Inc. v. FCC,* 683 F.2d 503 (D.C. Cir. 1982). One of the justifications proffered by the

---

[8] Indeed, a significant fluctuation in the average price of television stations being sold in a given year may be caused by the sale in one of the sample years of even one major market station.

Commission for a renewal expectancy was to promote industry stability. But that stability was not an end in itself, but instead was for the purpose of promoting investment in broadcast stations. The assurance that a well-run station will have its license renewed helps to attract investment capital. However, a Commission policy which is designed, as BCFM advocates, to artificially reduce the value of broadcast stations would, rather than strengthen service to the public, hamper it by reducing the ability of broadcasters to attract capital.

BCFM makes the extraordinary assertion that "a service continuity requirement would increase stability in the marketplace, *making the prospect of investing in broadcasting more attractive to lenders.*" *BCFM Comments* at 16. To the contrary, a legitimate concern of lenders is the security of their investment — if a borrower's projections prove unrealistic, can the investment be recouped? In the absence of a required holding period, lenders know that an unsuccessful broadcaster can try to find a buyer who may either pay off the original loan or provide additional security. If a station could not be transferred for three or more years, lenders would face the possibility that they would be stuck with a non-performing loan for an extended period. There are few actions which the Commission could take which would be more effective in *reducing* the attractiveness of broadcast investments than requiring a lengthy holding period.[9]

---

9 The untoward effects of a reestablished holding requirement would be dramatically exacerbated were the Commission to accept the suggestion of BCFM and the United States Catholic Conference that licensees be required to retain stations for an entire license period. For radio stations in particular, the inability to transfer a station for the better part of a decade after it is acquired would virtually extinguish sources of new capital for radio investments, particularly investments for new or minority operators. Few, if any, lenders or investors could responsibly agree to finance an untested venture were there no exit strategy for seven years. Thus, BCFM's argument that a new holding rule would aid the Commission's policy of increasing minority ownership completely misapprehends the nature of broadcast investment.

BCFM argues that licensees who may be interested in a short-term profit will pursue strategies that do not serve the public interest. BCFM claims that it would be in such a licensee's best interests to reduce expenditures on news or other public interest programming, and favor instead cheap programming that could attract a short-term increase in a station's ratings. *BCFM Comments* at 12-16. Again, BCFM is unable to proffer even one example of a licensee engaging in this type of behavior, and the Commission is apparently expected to take action merely because BCFM says it should. In fact, the behavior BCFM suggests is encouraged by the absence of a mandatory holding period is both counter-intuitive and the imposition of a mandatory holding rule would not affect these incentives, were they to exist.

BCFM posits that broadcasters will not engage in public service programming over the short run because it is expensive and does not attract audiences. BCFM does not explain why there would be any greater incentive to provide unattractive public service programming over the long term. If the programming BCFM believes is so important does not result in any benefit for a station, licensees would not have any greater reason to provide such programming (beyond the minimum necessary for license renewal) were they to own a station for six months or 25 years. Rather, broadcasters provide public service programming because it not only is an obligation of their license, but also because news and other public interest programming is demanded by the audience.[10] Further, a reputa-

---

[10] Although the Commission abolished its programming guidelines for television nearly a decade ago, *Television Deregulation*, 98 FCC 2d 1076 (1984), *recon. denied*, 104 FCC 2d 357 (1986), *aff'd in part and rev'd in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987), 1991-92 financial data indicates that network and affiliate stations are devoting an increasing percentage of their expenses to their news departments. The percentage of expenses for news of network affiliates increased from 20.3 to 20.9 percent, and independent stations' news expenses grew from 5.3 to 6.4 percent of their total expenses. *NAB 1993 Television Financial Report* 33, 64, 150, 181 (1993). That this growth in the resources devoted to news programming occurred at a time when, like the rest of the U.S. economy, stations were trying to reduce costs,

tion for serving the public enhances the image of a station, and therefore, helps to increase the size of its audience. Even a licensee interested in quickly improving the value of a station would thus most likely find that the best way to accomplish that end would be to add to the station's public service, rather than eliminate desirable programming.

BCFM also posits that the absence of a long required holding period might permit licensees to evade Commission review of their actions. *See BCFM Comments* at 17, 19. Of course, when an application is filed to transfer a license, the Commission has an opportunity to review whether the transferor has operated the station in the public interest. The Commission can determine then whether the licensee has engaged in improper trafficking, reduced the quality of the service provided to the public, or failed to follow the Commission's EEO rules, and any appropriate sanctions can be imposed. Thus, the assumption that a licensee could consciously evade Commission regulations because it intended to sell before its renewal application becomes due is simply wrong.

The same point applies to BCFM's argument (*BCFM Comments* at 18-19) that a required holding period would prevent licensees from evading their promises to the Commission. The Commission can make any needed determination that a licensee has not implemented its promises in good faith when it reviews an application to transfer the station's license. Further, simply requiring a licensee to keep control of a station will do little to ensure that its commitments are being met. If a new licensee entirely abandoned its integration proposal, the fact that it would have to keep control over the station for a period of years would not do anything to ensure that its commitments were kept or in any way add to the integrity of the Commission's selection processes.

---

demonstrates that the Commission was correct in concluding that stations would respond to public needs without specific regulatory mandates.

Conclusion

The suggestions of BCFM, *et al.*, that trafficking in station licenses is commonplace and injurious to the public are thus entirely without merit. A new mandatory holding period would harm the public interest by reducing investment in broadcast stations at a time when the growth of cable and other media already jeopardize their economic future. For the foregoing reasons, and the reasons set forth in NAB's initial comments on the *Further Notice*, the Commission should not adopt any new mandatory station holding periods.

Respectfully submitted,

NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Henry L. Baumann

Jack N. Goodman

Counsel

Mark R. Fratrik, Ph.D.
Vice President/Economist
NAB Research & Planning

October 28, 1993

Certificate of Service

I, Karen Koon, hereby certify that I have, this 28th day of October 1993, caused to be sent by mail, first class postage prepaid, copies of the foregoing "Reply Comments of the National Association of Broadcasters on the Further Notice of Proposed Rulemaking" to the following:

Angela J. Campbell, Esquire
Citizens Communications Center
Institute for Public Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Andrew J. Schwartzman, Esquire
Gigi Sohn, Esquire
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

Bruce A. Eisen, Esquire
Kaye, Scholer, Fierman, Hays & Handler
Suite 1100
901 15th Street, N.W.
Washington, D.C. 20005-2327

Richard A. Helmick, Esquire
Cohn & Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1573

James J. Freeman, Esquire
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Mark E. Chopko, Esquire
Katherine G. Grincewich, Esquire
United States Catholic Conference
3211 4th Street, N.E.
Washington, D.C. 20017

Karen M Koon

Karen Koon